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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. ALEXANDER KOSTYUKOV, ET AL, Defendant.	Case No. 2:12-cr-0004-APG-GWF **NON-PARTY GOOGLE INC.'S MOTION TO QUASH SUBPOENA TO TESTIFY AT A HEARING OR TRIAL IN A CRIMINAL CASE**

Non-Party Google Inc. ("Google") moves to quash a subpoena requiring a California-based records custodian to travel to Las Vegas for Monday, November 18, 2013 to testify solely to establish the authenticity of Google's records. To the extent possible, Google requests consideration of this Motion **in advance of November 18, 2013**.

This Motion is based upon the below Memorandum of Points and Authorities and any argument of counsel entertained by the Court as to this matter.

RESPECTFULLY SUBMITTED this 14th day of November, 2013.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Fed. R. Evid. 902(11) is intended to obviate the need for a live witness to authenticate business records in federal trials. To that end, Google Inc. ("Google") has provided the Government with a Rule 902(11) declaration to authenticate and admit certain of its business records that the government intends to use at the trial scheduled in this matter for November 18, 2013. Nevertheless, the government has served non-party Google with a witness subpoena to authenticate its business records at trial (hereafter, the "Witness Subpoena"). *See* Exhibit 1 to the Declaration of Despina Fafoutis ("Fafoutis Decl."). Despite the dictates of Rule 902(11), the Witness Subpoena purports to demand that Google send one of its California-based records custodians to Las Vegas to provide testimony. Google understands that the sole reason the Government seeks live testimony is to establish the authenticity of the records Google produced, but these records are well within the ambit of information covered by Rules 803(6) and 902(11).

Accordingly, Google respectfully submits that the Witness Subpoena should be quashed because Google's business records can be authenticated and admitted without live testimony from Google, thus rendering the Witness Subpoena unreasonable and oppressive. *See* Fed. R. Cr. P. 17(c)(2). To the extent possible, Google requests consideration of this Motion **in advance of November 18, 2013**.

II. FACTUAL BACKGROUND

On March 11, 2011, Google received a search warrant (hereafter, the "Warrant") from the United States Secret Service requesting certain business records. *See* Fafoutis Decl. ¶ 5. Due to the volume of information requested, Google produced in two parts: first, on April 26, 2011, Google produced its first set of documents in response to the Warrant. *Id.* ¶ 5. Second, on June 16, 2011, Google produced a second set of documents. *Id.*

On November 6, 2013, the Witness Subpoena was served upon Google by the United States Attorney's Office, District of Nevada, pursuant to Rule 17 of the Federal Rules of Criminal

Procedure. *See* Fafoutis Decl., Ex. 1. The Witness Subpoena purports to demand that Google's Custodian of Records appear and testify at trial.

On November 13, 2013, Google sent a certificate of authenticity regarding the records produced in response to the warrant. Fafoutis Decl., ¶ 7, Ex. 2. Google understands that the Government anticipates that Defendant may object to any certification in lieu of live testimony, and therefore seeks live testimony to establish the authenticity of the records produced by Google. Google's counsel has attempted to resolve this matter without the Court's intervention, to no avail, and therefore files this Motion to Quash.

III. ARGUMENT

Pursuant to Federal Rule of Criminal Procedure 17(c)(2), "the court may quash or modify [a] subpoena if compliance would be unreasonable or oppressive." *See, e.g., U.S. v. Bergeson*, 425 F.3d 1221, 1227-28 (9th Cir. 2005) (upholding a district court order quashing a subpoena for testimony pursuant to Fed. R. Crim. P. 17(c)(2)); *U.S. v. Washington*, No. CR 11–61–M–DLC, 2012 WL 3061519 (D. Mont. July 26, 2012) (granting motion to quash witness subpoena under Rule 17(c)(2)); *U.S. v. Weldon*, No. CRIM.A. 05-45-DLB, 2006 WL 905932, at *1 (E.D. Ky., Apr. 7, 2006) ("the Court has the inherent authority to review the propriety of trial subpoenas.").

A. The Testimony Contemplated by the Witness Subpoena is Duplicative and Unnecessary

Federal Rule of Evidence 803(6)[1] provides an exception to the hearsay rule for records of regularly conducted activity as "shown by the testimony of the custodian or other qualified witness, *or by a certification that complies with Rule 902(11)*…." (emphasis added). This exception applies if:

> **(A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge;

[1] Federal Rules of Evidence 803 and 902 were reworded 2011. As expressly reflected in the Advisory Committee notes for each Rule, the changes "are intended to be stylistic only" and "[t]here is no intent to change any result in any ruling on evidence admissibility." Fed. R. Evid. 803 advisory committee notes; Fed. R. Evid. 902 advisory committee notes.

> **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> **(C)** making the record was a regular practice of that activity
>
> . . .
> **(D)** neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness

Federal Rule of Evidence 902(11) provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

> **(11) Certified Domestic Records of Regularly Conducted Activity.**—The original or a duplicate of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

In the case at bar, the documents produced contain information recorded by Google servers automatically at the time, or reasonably soon after, it was entered or transmitted by the user. Fafoutis Decl., Ex. 2; *see also*, Fed. R. Evid. 803(6)(A),(B). The records were kept in the course of regularly conducted activity by Google, and were made in course of regularly conducted activity as a regular practice by Google. Fafoutis Decl., Ex. 2; *see also*, Fed. R. Evid. 803(6)(C),(D). Google is aware of no allegation of untrustworthiness. *See, e.g.*, Fed. R. Evid. 803(6)(E). Accordingly, there can be no dispute that the documents produced by Google in response to the Warrant are business records under Rule 803(6). For the same reason, there can also be no dispute that Google's declaration complies with Federal Rule 902(11).

Therefore, the documents produced by Google have been authenticated and the Government's request for further testimony as to their authenticity is duplicative and unreasonable. *U.S. v. Anekwu*, 695 F.3d 967 (9th Cir. 2012) (rejecting Confrontation Clause challenge from defendant and upholding admission of foreign mailbox applications and banks records authenticated by certificate from records custodian, noting that use of certificates is permissible where the purpose is solely to authenticate records and not to establish facts); *U.S. v. Weiland*, 420 F.3d 1062, 1077 (9th Cir. 2005) (requiring records custodians "to make themselves available for cross-examination in the countless criminal cases heard each day in our country would present a serious logistical challenge without any apparent gain in the truth-seeking process") (internal quotation marks omitted); *U.S. v. Yeley-Davis*, 632 F.3d 673, 677-81 (10th Cir. 2011) (rejecting Confrontation Clause challenge from defendant and upholding admission of phone records authenticated by Rule 902(11) declaration from Verizon's records custodian); *U.S. v. Green*, 396 Fed. Appx. 573, 574-75, 2010 WL 3401485, at *2 (11th Cir. 2010) (same as to declaration from Metro PCS custodian) (unpublished).[2]

Indeed, to enforce the Government's Witness Subpoena and compel Google to send a witness to provide live testimony on these issues would defeat the very purpose for which Rule 902(11) was enacted, as noted by one of the drafters of the rule:

> One of the most useful (though perhaps least noticed) accomplishments of the Judicial Conference's Advisory Committee on the Rules of Evidence during this Court's tenure as its Chairman was in adding a new Rule 902(11) to the self-authentication provisions of Rule 902. That new provision was intended to obviate the need for live witnesses to parade to the stand to support the admission into evidence of business records.

United Asset Coverage, Inc. v. Avaya Inc., 409 F. Supp. 2d 1008, 1052 (N.D. Ill. 2006); *see also Lorraine v. Markel American Insurance Co.*, 241 F.R.D. 534, 552 (D. Md. 2007) ("Rule 902(11) also is extremely useful because it affords a means of authenticating business records under Rule 803(6), one of the most used hearsay exceptions, without the need for a witness to testify in person at trial"); *DirecTV, Inc. v. Reyes*, No. 03 C 8056, 2006 WL 533364, at *3 (N.D. Ill. Mar. 2,

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[2] *Cf. U.S. v. Marshall*, No. 07-20569-CR, 2008 WL 2474662, at *2 (S.D. Fla. June 17, 2008) (ordering "issuance of a subpoena to the records custodian of Yahoo, accompanied by an appropriate Affidavit for the records custodian to complete to establish the authenticity of these [email] records to obviate the need for the appearance of the records custodian at trial."); *U.S.. v. Doolittle*, 341 F. Supp. 163, 169 (M.D. Ga. 1972) (quashing witness subpoena where the only possible relevant testimony would involve ministerial matters already covered by an affidavit before the court), *judgment aff'd*, 507 F.2d 1368 (5th Cir. 1975), *on reconsideration*, 518 F.2d 500 (5th Cir. 1975) *and cert. dismissed*, 423 U.S. 1008, 96 S. Ct. 439, 46 L. Ed. 2d 380 (1975); *see also* 7 Fed. Proc. Forms § 20:485 ("a subpoena to testify may be quashed where . . . the only possible relevant testimony would involve material already covered by an affidavit before the court").

2006) ("The purpose of Rule 902(11) . . . is to establish a 'procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness.'") (quoting Advisory Committee Notes, 2000 Amendments to Rule 902).

B. The Burden Imposed on Google by Complying With the Witness Subpoena Outweighs the Government's Need for Testimony

In assessing whether to enforce a witness subpoena issued pursuant to Federal Rule of Criminal Procedure 17, it is useful to look to precedent under Federal Rule of Civil Procedure 45, since the two are "substantially the same." *See* Advisory Committee Notes, 1944 Adoption of Rule 17.

When assessing a motion to quash a subpoena issued pursuant to Federal Rule of Civil Procedure 45, "the test for 'undue burden' is a balancing test that pits the need of the party for the sought production against the interests of the subpoenaed witness in resisting compliance." *See* 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 45.32 (3d ed. 2007) citing *Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357, 377 (5th Cir. 2004); *Northwestern Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 927-28 (7th Cir. 2004); *Heidelberg Ams., Inc. v. Tokyo Seisakusho, Ltd.* 333 F.3d 38, 40 (1st Cir. 2003); *see also Schaaf v. SmithKline Beecham Corp.*, No. 3:06-CV-120-J-25TEM, 2006 WL 2246146, at *2-3 (M.D. Fla. Aug. 4, 2006) (applying balancing test in quashing non-party subpoena).

The Government cannot demonstrate any interest in enforcing the Witness Subpoena beyond proving that which has already been proven: the documents produced by Google are authentic business records under Federal Rules of Evidence 803(6) and 902(11). Google understands that the Government only seeks live testimony because it is concerned that Defendant will take the unreasonable and indefensible position that a declaration is inappropriate.

Google, on the other hand, can demonstrate a significant interest in opposing the Witness Subpoena. Specifically, Google maintains a security office for responding to legal process. *See* Fafoutis Decl. ¶ 2. Google's California-based team receives literally tens of thousands of requests for assistance on an annual basis. *Id.* The types of investigations that lead to these requests run the gamut from fraud cases, kidnapping and other emergencies, to routine civil and criminal demands for records. *Id.* Numerous courts throughout the country have accepted Google's declarations of authenticity for business records pursuant to Rule 902(11). *Id.* If courts suddenly refused to accept Google's declarations of authenticity, and Google was therefore forced to send a witness (or witnesses) to attend each and every criminal trial in which its business records are offered as evidence, it would simply be impossible for Google to sufficiently staff its team. *Id.*

Accordingly, when the Government's tenuous interest in enforcing the Witness Subpoena is weighed against non-party Google's interest in seeing that it is not enforced, the balance favors Google.

IV. CONCLUSION

For the reasons stated, Google respectfully submits that the Witness Subpoena is unreasonable and oppressive and requests that it be quashed in its entirety in advance of the November 18 testimony date.

RESPECTFULLY SUBMITTED this 14th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano Wilson LLP, and that on the 14th day of November, 2013, I served a true and correct copy of the foregoing **NON-PARTY GOOGLE INC.'S MOTION TO QUASH SUBPOENA TO TESTIFY AT A HEARING OR TRIAL IN A CRIMINAL CASE** via the U.S. District Court's CM/ECF filing system on November 14, 2013.

/s/ Marianne Carter
An employee of McDonald Carano Wilson LLP